TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 110.

D. D. LUCIUS, APPELLANT,

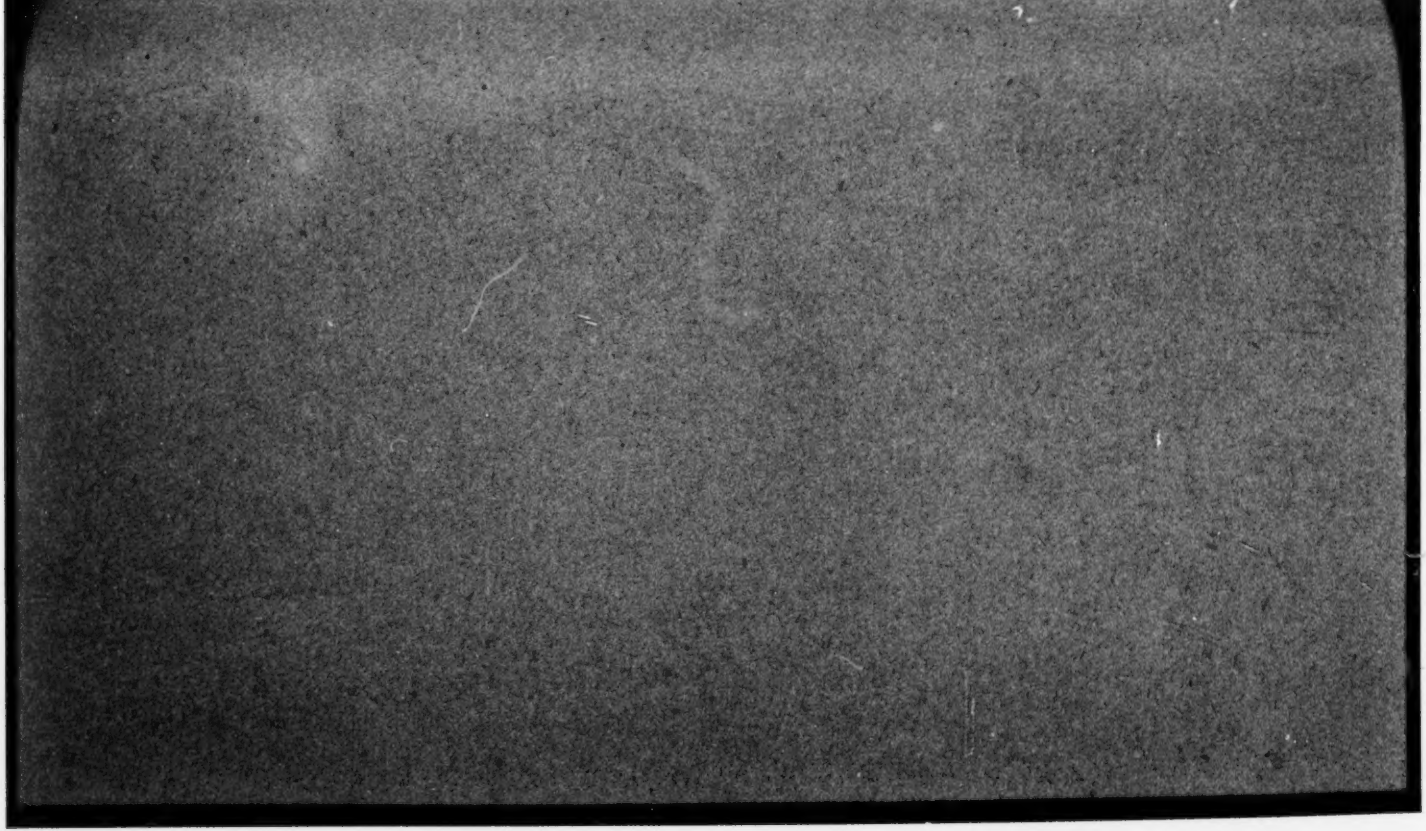
vs.

THE CAWTHON-COLEMAN COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED AUGUST 26, 1904.

(19,057.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1904.

1 A transcript of the record and proceedings in the district court of the United States for the southern district of Alabama in the bankruptcy proceeding number 158, in the matter of D. D. Lucius, bankrupt, in the matter of the petition of the Cawthon-Coleman Company for the establishment and enforcement of a lien.

2 *Certificate of Facts and of Issues and Conclusion of Law by the Court.*

District Court of the United States for the Southern District of Alabama.

In the Matter of D. D. Lucius, Bankrupt. No. 158. In Bankruptcy.

In the Matter of the Petition of the Cawthon-Colkman Company for Establishment and Enforcement of Lien.

Certificate of Facts and of Issues and Conclusion of Law by the Court.

On 6th. November, 1901, D. D. Lucius, appellant, being indebted to the Cawthon Coleman Company, appellee, in the sum of $1180.59, made to it his note for that sum, payable November 1, 1902, with interest from date, the note embodying waiver of exemptions of personal property in form prescribed by laws of Alabama. On 23d. November, 1901, said Lucius and his wife executed to appellee a mortgage on a lot of land in Clarke county, Alabama, to secure the payment of said note; there was a dwelling house on said lot and the same was then the homestead of said mortgagors, who were then and have ever since been resident citizens of Alabama.

The mortgage contained the following covenant as to insurance: "And the said D. D. Lucius and Katie M. Lucius hereby covenant and agree with the said Cawthon-Coleman Company that they will keep the property hereinbefore described insured against loss by fire to at least the full amount of all encumbrances upon said property, and in case of all or any part of said property is destroyed by fire the said Cawthon-Coleman Company shall receive, and we hereby convey to the said company such an amount of said insurance as may be due and unpaid upon this mortgage and the note herein described at the time of such loss or destruction."

The law day of the mortgage was November 1st, 1902. In June, 1902, after a partial payment of the debt secured by the mort-
3 gage, the house was destroyed by fire. At the time of the execution of the mortgage and subsequently up to and including the time at which the fire took place, said D. D. Lucius had two policies of insurance on the said dwelling house, both being in the London and Lancashire Fire Insurance Company, and being numbered respectively 3994976 and 3994958; each of said policies was

payable to him in case of loss; said policy number 3994958 was for $353 44/100, and said policy number 3994976 was for $796.56. Said mortgage was executed, acknowledged and certified as required by the laws of Alabama for a valid mortgage of a homestead.

On October 4th., 1902, said D. D. Lucius filed his petition in the United States district court for the southern district of Alabama to be adjudged a bankrupt, and on the same day he was so adjudged, and the case was referred to the referee in bankruptcy of said court.

As a part of the schedules accompanying said petition said bankrupt included his claim for exemptions as follows:

"Petitioner claims as excepted from the operation of the acts of Congress relating in bankruptcy as a personal property exemption under the constitution and acts of Alabama, the stock of drugs in store West Front street Thomasville, Ala. (The particular items and their valuation cannot be given now, but will be given later on),

Estimated to be worth	$1,000.00
Petitioner claims as real property exemption under the State laws the sum of $1,000.00 due by London & Lancashire Fire Insurance Co. for loss sustained from destruction of his residence by fire which was insured against loss by fire by said London and Lancashire Fire Insurance Co. as shown by policies #3994976 and #3994958	1,000.00
Total	$2,000.00"

The lot after the house was burned was worth five hundred dollars, but there was a mortgage upon it prior to that of appellee for its full value.

At the time appellant filed his petition in bankruptcy an
4 adjustment of the loss with the insurance company had been had, but only a partial payment of the money determined to be due had then been made to him, and there still remained about $1150.00 due thereon.

The two policies of insurance went into the possession of the trustee of said bankrupt upon his appointment, but he had collected nothing upon them up to the time of service upon him of subpœna to answer appellee's petition. On 14th. March, 1902, appellee filed its petition to have the trustee ordered to collect the amount due upon the policies, and to establish its lien thereon to the extent of the balance due upon its claim secured by the mortgage, and that such balance should be paid to it by the trustee out of such collection when made.

After service of such subpœna upon him, and before the 2nd. of April, 1903, the trustee collected from the insurance company the balance due upon such policies, the same being about $1150.00.

On April 2nd, 1903, while appellee's petition was pending, the trustee reported to the court that he had designated and set apart

as exempt to the bankrupt "insurance policy # 3994976 issued by London & Lancashire Fire Insurance Company, the fire loss on which was adjusted at..... $796.56
Cash from insurance policy # 3994958..... 203.44

$1000.00"

The trustee did not in fact deliver to the bankrupt said policy # 3994976, or pay to him any sum of money out of the collection made on the other policy, but placed the whole amount collected by him upon the two policies in bank to await the decision of the court upon appellee's petition.

At the time the referee made the order directing the trustee to pay appellee the sum of $1,001.40 out of the proceeds of such insurance in his hands, there was due appellee that sum on its debt secured by said mortgage.

5 The referee did not confirm said order of the trustee, but instructed him to hold the money until the determination of appellee's petition, and it is now so held.

On April 6th, 1903, the bankrupt filed a verified plea to the jurisdiction of the court on the ground that the insurance money was exempted, and the bankruptcy court was without jurisdiction to hear and determine a claim of lien on it.

The referee determined this question against the bankrupt; and upon a review by the district judge sitting in bankruptcy of the referee's decision, the judge confirmed it and rendered a decree asserting that the bankruptcy court had jurisdiction to hear and determine this matter and granted the relief prayed by appellee's petition.

Before the 14th of March 1903 the trustee set apart and delivered to the bankrupt the stock of goods claimed by him as exempt as above set forth.

The issues, upon the facts as above stated, were:

1. Had the court of bankruptcy jurisdiction to hear and determine the question whether the said insurance money claimed by the bankrupt as exempted, was exempt to him?

2. Had the court of bankruptcy jurisdiction to hear and determine the claim of Cawthon-Coleman Company to a lien on said money?

Conclusion of Law.

The court finds that the said insurance money is not exempt to said bankrupt and that the court has jurisdiction to hear and determine that question, and the claim of said Cawthon-Coleman Company to a lien on the same.

August 3 / 1903.

(Signed) HARRY T. TOULMIN, *Judge.*

Filed this August 3, 1903.

RICH'D JONES, *Clerk.*

6 *Decree of July 25th, 1903, Confirming Action of Referee.*

SATURDAY, *July 25th, A. D.* 1903.

Present: Honorable Harry T. Toulmin, judge presiding.

Minutes, page 774.

In the Matter of D. D. LUCIUS. No. 158. In Bankruptcy.

In the Matter of the CAWTHON-COLEMAN COMPANY.

This cause having been submitted for decree on the petition of the Cawthon-Coleman Company with the certificate of the referee in bankruptcy containing his ruling and action on said petition, and the same being duly considered by the court, the court is of opinion that this court has jurisdiction to determine the matter in dispute, and that, on the facts reported by the referee, his decision is correct; it is therefore ordered and decree- by the court that the ruling of the referee in this matter be and the same is hereby concurred in and the same is affirmed.

Opinion, July 25, 1903.

In the Matter of D. D. LUCIUS, Bankrupt. In Bankruptcy. Number 158.

In the Matter of the Petition of the CAWTHON-COLEMAN COMPANY.

Mr. William J. Johnson and Messrs. Pillans, Hanaw & Pillans for the bankrupt.

Messrs. Davis & Gunn & R. H. & N. R. Clarke for petitioners.

TOULMIN, *Judge:*

The real question in this case is not whether the bankrupt court has jurisdiction to pass on the validity of a lien on property exempt by law to the bankrupt, as contended by counsel for the bankrupt and the trustee, but is whether it has jurisdiction to determine the
7 claim of the bankrupt to an exemption of certain money in the hands of the trustee collected by him as assets of the bankrupt estate, on which the petitioner alleges it has an equitable lien, and to which it is entitled. The bankrupt law allows to the bankrupt the exemption provided by the law of the State, but the manner in which the exemption is to be claimed, set apart and awarded is regulated by the bankrupt law. The voluntary bankrupt must claim the exemption to which he is entitled at the time of filing his petition.

Bankrupt act, sec. 6; 100 Fed., 284.

This bankrupt claimed at the time of filing his petition $2000 as exempt—$1000 in certain specific articles of personal property, and $1000 as real property exemption in money due by London & Lancashire Fire Ins. Co., the money now in dispute.

The trustee has collected the money from the insurance company, and holds it subject to the order of the court. The bankrupt's claim of exemption has not been determined and set apart to him as required by the bankrupt law. A dispute has arisen as to his right to exempt the money in question. The court of bankruptcy is given jurisdiction to determine the right to and the valuation of the property claimed. The bankrupt court has jurisdiction to determine all claims of bankrupts to their exemption, and has exclusive jurisdiction to determine such claims.

Bank. act, sec. 2, subd. 11; 106 Fed., 667; 108 Fed., 599; 113 Fed., 115; 120 Fed., 100; *Ib.* 657; *Ib.* 999; 181 U. S., 188.

Upon the determination of this question, the court formally sets apart to the bankrupt and segregates from the estate that which the State law exempts. When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankrupt court would have no jurisdiction to entertain a plenary suit in equity by a creditor of
8 the bankrupt to reach and subject to his claim such exempt property.

Woodruff *vs.* Cheeves, 105 Fed., 601; *In re* Wells, 105 Fed., 762.

The bankrupt's right to exemption is not to any specific personal property or money but to $1000 in value to be selected, &c. His right to the money in question has never been determined, awarded and set apart to him as exempt.

I am unable to perceive the applicability of the case of Bardes *v.* Bank (178 U. S., 524) to this case. That case was an independent suit brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to the proceedings in bankruptcy. The court held that the bankrupt court had no jurisdiction of the suit, and said that controversies not strictly or properly a part of the proceedings in bankruptcy did not come within the jurisdiction of the bankrupt court.

Under the recent amendment of the bankrupt act the courts of bankruptcy have jurisdiction in such cases concurrent with the State courts. However, the decision in Bardes *vs.* Bank did not involve the claim or right of a bankrupt to an exemption.

In the case of Lockwood *vs.* Exchange Bank, Supr. Court Reporter vol. 23 No. 15, the question was whether the bankrupt court

had jurisdiction to protect or enforce against the bankrupt's exemption, the rights of creditors not having a judgment or other lien, whose obligation to pay contained a written waiver of the homestead exemption authorized and prescribed by the law of the State. The supreme court held that the title to the property of a bankrupt exempted by State laws, remained in the bankrupt and did not pass to his representative in bankruptcy; that although the bankrupt act conferred upon the court of bankruptcy authority to control exempt property in order to set it aside and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act
9 declares shall not pass from the bankrupt or become part of the bankrupt assets. The supreme court was there dealing with property prescribed as exempt by the laws of the State, which had been applied for and set apart to the bankrupt, and which the creditor was seeking to subject to the payment of his debt, on the ground that the bankrupt had waived his right of exemption to it. The statute of the State prescribed the proceeding to be taken to accomplish the end sought. The decision of the supreme court was in effect that the court of bankruptcy had no jurisdiction in such proceedings to enforce the rights of the unsecured creditor.

In the case in hand the State law has not prescribed the specific money or any specific personal property to be exempt, and this specific money has not been set apart to the bankrupt as exempt, and has not been defined as that upon which the law operates as exempt. And here the creditor is secured—has a lien on the particular money. That the petitioner has such lien is hardly controverted.

The court of bankruptcy has jurisdiction of the petition of a creditor of the bankrupt, asserting a lien on the proceeds of a sale of property belonging to the bankrupt, which have come into the hands of the trustee, or on money collected by him as assets of the bankrupt estate. Such a petition is a bankrupt proceeding under the bankrupt act.

Hutchinson, trustee, *vs.* Otis Wilcox & Co., Supr. Ct. Reporter, vol. 23, No. 15 p. 778.

As in the case of a mortgage, the court of bankruptcy will entertain the summary petition of the mortgagee for the sale of the property, and ascertain and liquidate the lien by its sale and apply the proceeds in payment, &c.

Brandenburg on Bankruptcy, section 1092.

My opinion is that this court has jurisdiction to determine the matter in dispute, and that on the facts, reported by the referee, his decision is correct. Hence, I concur in and affirm the same.

Filed July 25, 1903.

RICH'D JONES, *Clerk.*

10 *Petition for Appeal.*

In the District Court of the United States for the Southern District of Alabama.

In re D. D. LUCIUS, Bankrupt. In Bankruptcy.

In the Matter of the Petition of the CAWTHON-COLEMAN COMPANY.

To the honorable district court of the United States for the southern district of Alabama:

Comes D. D. Lucius and conceiving himself aggrieved by the decree entered in this matter in the above entitled cause on the 25th day of July, A. D. 1903, doth hereby appeal from said decree to the Supreme Court of the United States and he prays that this appeal may be allowed, and that a transcript of the records, proceedings, and papers upon which said decree was made, in accordance with the statute and rules of court in such case made and provided, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) WM. JAS. JOHNSON,
(Signed) PILLANS, HANAW & PILLANS,
Att'ys for Appellant, D. D. Lucius.

Filed August 3, 1903.

RICH'D JONES, *Clerk.*

Assignment of Errors.

In the District Court of the United States for the Southern District of Alabama.

In re D. D. LUCIUS, Bankrupt. In Bankruptcy.

In the Matter of the Petition of the CAWTHON-COLEMAN COMPANY.

11 Comes D. D. Lucius, and assigns error upon the decree of the district court of the United States for the southern district of Alabama rendered in this matter in the above entitled cause upon the 25th day of July 1903, and says that there are manifest errors in said decree and as such errors assigns the following:

1. The court erred in decreeing that it had jurisdiction to hear and determine the said petition of the said Cawthon-Coleman Company.

2. The court erred in decreeing that it had jurisdiction to adjudicate the matters and questions raised by the said petition of the said Cawthon-Coleman Company.

3. The court erred in not dismissing the said petition of the said Cawthon-Coleman Company, and in not remitting it to the State forum for its remedy.

4. The court erred in taking jurisdiction of the subject matter of the said Cawthon-Coleman Company's said petition, and in proceeding to hear and determine the claim of the said Cawthon-Coleman Company set up in said case.

(Signed) WM. JAS. JOHNSON,
(Signed) PILLANS, HANAW & PILLANS,
Att'ys for Appellant, D. D. Lucius.

Filed August 3, 1903.

RICH'D JONES, *Clerk.*

Order Allowing Appeal and Fixing Bond.

MONDAY, *August 3rd, A. D.* 1903.

Present: Honorable Harry T. Toulmin, judge, presiding.

Minutes, page 776.

In the Matter of D. D. LUCIUS, Bankrupt. In Bankruptcy. Number 158.

In the Matter of the CAWTHON-COLEMAN COMPANY.

In this cause the said D. D. Lucius having filed assign-
12 ment of errors and a petition praying an appeal to the Supreme Court of the United States from the decree rendered herein in the matter of Cawthon-Coleman Company on July 25th. 1903:

It is ordered by the court that said appeal be and is hereby allowed as prayed, upon the said bankrupt making and filing bond herein conditioned, and payable as required by law, in the sum of five hundred dollars ($500.00).

Appeal Bond.

District Court of the United States, Southern District of Alabama.

In re D. D. LUCIUS, Bankrupt. In Bankruptcy. No. 158.

In the Matter of the Petition of the CAWTHON-COLEMAN COMPANY.

Be it known that we, D. D. Lucius, as principal, and J. V. Adams, W. I. Waller and S. C. Garrett as surety, are held and firmly bound unto the above named Cawthon-Coleman Company in the sum of five hundred dollars to be paid to the said Cawthon-Coleman Company, its successors or assigns, for the payment of which well and

truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated the 10th. day of August, A. D. 1903.

Whereas the above named D. D. Lucius has been allowed an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled matter by the district court of the United States for the southern district of Alabama;

Now therefore, the condition of this obligation is such that
13 if the said D. D. Lucius shall prosecute his said appeal to effect and answer all damages and costs that the said Cawthon-Coleman Company may sustain if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Signed)	D. D. LUCIUS.	[SEAL.]
(Signed)	J. V. ADAMS.	[SEAL.]
(Signed)	W. I. WALLER.	[SEAL.]
(Signed)	S. C. GARRETT.	[SEAL.]

Approved by

(Signed) HARRY T. TOULMIN,
District Judge.

Filed August 12, 1903.

RICH'D JONES, *Clerk.*

Agreement as to What to Put in Record on Appeal.

In the District Court of the United States for the Southern District of Alabama.

In re D. D. LUCIUS, Bankrupt. In Bankruptcy.

In the Matter of the Petition of the CAWTHON-COLEMAN COMPANY.

It is agreed between Messrs. Davis & Gunn and R. H. & N. R. Clarke, attorneys of record for the Cawthon-Coleman Company; and Wm. Jas. Johnson and Pillans, Hanaw & Pillans, attorneys of record for D. D. Lucius; that the record, on the appeal that has been taken by the said D. D. Lucius from the decree of the said district court in the matter of the said petition of the Cawthon-Coleman Company, shall consist of the following, to-wit: certificate of facts and of issues, and conclusions of law by the court; the court's decree appealed from and its opinion in support thereof; the petition of D. D.

Lucius for appeal, his assignment of errors, and the court's
14 order allowing the appeal; the appellant's bond; this agreement, and the citation of appeal.

(Signed) DAVIS & GUNN,
(Signed) R. H. & N. R. CLARKE,
Att'y- of Cawthon-Coleman Company.
(Signed) WM. JAS. JOHNSON,
(Signed) PILLANS, HANAW & PILLANS,
Att'y- for D. D. Lucius.

The foregoing agreement has been prepared by counsel for appellant and is signed for appellee at their request.

August 4th, 1903.

(Signed) DAVIS & GUNN,
(Signed) R. H. & N. R. CLARKE,
Attorneys for Appellee.

Filed August 4, 1903,

RICH'D JONES, *Clerk.*

15 *Citation.*

The President of the United States of America to the Cawthon-Coleman Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, D. C., within thirty (30) days from the date hereof, pursuant to an appeal allowed by the district court of the United States for the southern district of Alabama, in the bankruptcy proceeding number 158 in the matter of D. D. Lucius, bankrupt, wherein said D. D. Lucius is appellant and you the said Cawthon-Coleman Company is appellee, to show cause, if any there be, why the decree mentioned in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Honorable Harry T. Toulmin, judge of the district court of the United States for the southern district of Alabama, this the 12th day of August, A. D. 1903.

HARRY T. TOULMIN,
U. S. District Judge, Southern District of Alabama.

Attest:

[Seal U. S. Dist. Court, Sou. Dist. Alabama.]

RICHARD JONES,
Clerk U. S. District Court for the Southern District of Alabama.

Endorsed: U. S. district court sou. dist. Alabama. In bankruptcy No. 158, In the matter of D. D. Lucius, bankrupt. Filed this August 13th A. D. 1903, Rich'd Jones, clerk.

We hereby accept service of this citation and acknowledge receipt of a copy thereof this August 13th A. D. 1903,

DAVIS & GUNN &
R. H. & N. R. CLARKE,
Att'ys for Cawthon-Coleman Company, Appellee.

16 *Certificate.*

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama.

I, Richard Jones, clerk of said court do hereby certify that the foregoing pages numbered one (1) to 15 contain a true and correct transcript of the record and proceedings had in this court in bankruptcy matter number 158 in the matter of D. D. Lucius in the matter of the petition of the Cawthon-Coleman Company, made in accordance with the agreement of attorneys for the parties in interest, said agreement being page 12 hereof, as same appear of record and file in my office.

Witness my hand and seal of said court at Mobile, Alabama, this August 15th A. D. 1903.

[Seal United States District Court, Southern Dis. of Alabama.]

RICH'D JONES, *Clerk.*

Endorsed on cover: File No. 19,057. S. Alabama, D. C. U. S. Term No. 110. D. D. Lucius, appellant, *vs.* The Cawthon-Coleman Company. Filed August 26th, 1903. File No. 19,057.

APPELLANT'S

BRIEF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 110.

D. D. LUCIUS, APPELLANT,

vs.

THE CAWTHON-COLEMAN COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF OF H. PILLANS FOR APPELLANT.

WM. JAS. JOHNSON,
PILLANS, HANAW & PILLANS, of Counsel.

FACTS.

This appeal grows out of an effort made in the bankruptcy court by appellee to have appropriated to the payment of a debt due it from appellant. certain moneys, in the hands of appellant's trustee in bankruptcy, claimed by appellant as exempt and so set apart to him by the trustee; but on which appellee claimed a lien.

The facts are these:

In November, 1901, appellant, Lucius, owed appellee, the Cawthon-Coleman Co., $1,180.59. To evidence this indebtedness he gave his note payable November 1st, 1902. This note waived appellant's right to exemption of his *personal* property. To secure the payment of this note, Lucius and his wife exe-

cuted a mortgage on their homestead, they being at that time and ever since resident citizens of Alabama. The law day of the mortgage was the due date of the note. In June, 1902, after a partial payment of his debt, Lucius' dwelling (homestead) burned. At the time of the execution of the mortgage, and subsequently up to and including the time of the fire, this dwelling was insured in the London and Lancashire Fire Insurance Co., as evidenced by two policies, numbered respectively 3994976 and 3994958. Each of these policies was payable to Lucius. The first for $796.56, the second for $353.44.

On October 4th, 1902, Lucius filed his petition in bankruptcy and was adjudged bankrupt, and the case was referred to the referee. As part of the schedule filed by the bankrupt was his claim of exemptions as follows:

"Petitioner claims as excepted from the operation of the acts of Congress relating in bankruptcy, as a *personal property* exemption under the constitution and acts of Alabama, the stock of drugs in store West Front street, Thomasville, Alabama, (the particular items and their value cannot be given now, but will be given later on.) Estimated to be worth $1,000 00

Petitioner claims as *real property* exemptions under the State laws the sum of $1,000 00 due by London and Lancashire Fire Insurance Co., for losses sustained from destruction of his residence by fire, which was insured against loss by fire by said London and Lancashire Fire Insurance Co., as shown by policies No. 3994976 and 3994958 ..... $1,000.00

Total $2,000.00

When Lucius filed his petition in bankruptcy the loss had been adjusted with the insurance company. but only a partial payment made, leaving still due about $1,150.00.

When a trustee was appointed in the matter of Lucius' bankruptcy proceedings, he took possession of the said two policies of insurance but had collected nothing when notice to answer appellee's petition was served on him.

On March 14th, 1903, (in the printed record it appears "14th March, 1902," (see Rec. p. 2, last paragraph but two), but this is a clerical error, Lucius was not adjudged bankrupt till October 4th, 1902,) appellee filed its petition to have the

trustee ordered to collect the amount due upon the policies, and to establish its lien thereon to the extent of the balance due upon its claim secured by the mortgage, and to have such balance paid to it by the trustee out of such collection when made. After service of this notice and before April 2d, 1903, the trustee collected from the insurance company the balance due on such policies, being about $1,150.00.

On April 2d, pending appellee's petition, the trustee reported to the court that he had designated and set apart as exempt to the bankrupt: "Insurance policy No. 3994976, issued by London and Lancashire Fire Insurance Company, the fire loss on which was

Adjusted at	$ 796.56
Cash from Policy No. 3994958	203.44
Total	$1,000.00"

The trustee did not deliver to Lucius either the policy or the cash, but deposited the whole amount collected on both policies in bank to await the court's decision on appellee's petition.

The referee did not confirm the trustee's report but instructed him to hold the money till the determination of appellee's petition. The trustee still holds the money.

On April 6th, 1903, Lucius filed with the referee a verified plea to the jurisdiction of the court on the ground that the insurance money was exempt and the bankruptcy court without jurisdiction to hear and determine a claim of lien on it. The referee thought otherwise and made an order directing the trustee to pay appellee $1,001.40 out of proceeds of such insurance money in his hands, finding this sum to be due on the debt secured by the mortgage. Upon review of this decision by the district judge sitting in bankruptcy, it was confirmed. the court rendering a decree asserting its jurisdiction and granting appellee the relief prayed. (Rec., page 4.)

Lucius thereupon filed his petition for appeal and his assignment of error, and the district court certified to this court the facts, the issues arising therefrom, and its conclusions of law thereon. (Rec., pp. 1-3.)

So the matter stands before this court.

ASSIGNMENTS OF ERROR.

1. The court erred in decreeing that it had jurisdiction to hear and determine the said petition of the said Cawthon-Coleman Company.

2. The court erred in decreeing that it had jurisdiction to adjudicate the matters and questions raised by the said petition of the said Cawthon-Coleman Company.

3. The court erred in not dismissing the said petition of the said Cawthon-Coleman Company, and in not remitting it to the State forum for its remedy.

4. The court erred in taking jurisdiction of the subject matter of the said Cawthon-Coleman Company's said petition, and in proceeding to hear and determine the claim of the said Cawthon-Coleman Company set up in said case.

BRIEF AND ARGUMENT.

The court states the issues thus: (Rec. p. 3.)

1. Had the court of bankruptcy jurisdiction to hear and determine the question whether the said insurance money claimed by the bankrupt as exempted, was exempt to him?

2. Had the court of bankruptcy jurisdiction to hear and determine the claim of Cawthon-Coleman Company to a lien on said money?

These issues are identical with the question raised by the assignments of error, and can best be treated as one question and we shall so discuss them.

The bankruptcy court is a court of limited jurisdiction and must find its authority in the statute creating it.

In re *Morris*, Fed. Cas. No. 9825, see opin., 17 Fed Cas., pp. 793, 796.

Collier on Bankruptcy, p. 11.

To determine, then, of what the bankruptcy court has jurisdiction, we must look primarily to the bankruptcy Act of 1898. Those portions of the Act which touch on the bankrupt's exemptions, are as follows:

"This act shall not affect the allowance to bankrupt's of the exemptions which are prescribed by the state laws, in force

at the time of filing of the petition, in the state wherein they have had their domicile." Sec. 6.

"DUTIES OF BANKRUPTS. .....

prepare and file in court .....

a claim for such exemptions as they may be entitled to .....

....." (Sec. 7. subd. 8.)

"DUTIES OF TRUSTEES. .....

set apart the bankrupt's exemptions and report the items and estimated value thereof to the court ....." (Sec. 47, subd: 11.)

"TITLE TO PROPERTY. The trustee of the estate of a bankrupt ..... shall be vested by operation of law with the title of the bankrupt ..... except in so far as it is to property which is exempt." Sec. 70, subd. a.

"Courts of bankruptcy ..... have jurisdiction to ..... determine all claims of bankrupts to their exemptions." Sec. 2, subd. 11.

There is the fountain from which the jurisdiction over exempt property must spring. If from these extracts a jurisdiction in the case at bar can be drawn, Lucius must fail in his appeal. If, on the other hand, they do not confer jurisdiction, none exists, and the court below erred in asserting it.

Let us then examine the fountain heads:

The first section above cited leaves of force the State exemption laws—expressly disavows any federal interference with that portion of the State's polity, with its mass of constitutional provision, legislative enactment, and judicial decision, varying with the various States.

Still, the right of exemption is a barren right unless it can be exercised. So the second and third sections (numbering in the order above cited) provide the machinery for the assertion of the right—a claim by the bankrupt and a setting aside by the trustee. This machinery of necessity forms part of the enginery of the bankruptcy court. But there, we respectfully submit, the processes of the bankruptcy court as to exempt property (with one exception noted hereafter) cease, and its powers and jurisdiction are exhausted. This conclusion would seem to be strongly supported by the 4th extract

cited—*title to the exempt property never passes to the trustee*, who upon his appointment stands *absolutely, as to the title to all other property*, in the bankrupt's shoes, *as of the date of the adjudication of bankruptcy*. The trustee is the impersonation of the court for the purposes of the practical administration of the business side of the bankruptcy proceedings. The property in his possession is *in custodia legis;* he can take no steps without the court's direction; no action can be brought against him save by leave of the court appointing him. (Lloyd vs. Ball, 77 Fed. Rep., at 371.) A wrongful interference with his possession is contempt and may be punished as such. (*Ex parte* Haywood, 45 L T., 326.) So his control is the court's control; his title the court's title. But the law expressly prevents his ever getting title to the exempt property. So the court, as it were, having absolute title to all a bankrupt's property save that which is exempt, has as a consequence, jurisdiction over it to do as it will. Consequently we submit, having *no* title (to repeat the figure) to the exempt property, it has *no* jurisdiction thereover—save in one single class of cases; and this brings us to the exception above mentioned.

The last extract of the bankruptcy act above cited, seems perhaps at first blush out of harmony with the balance of the act's provisions. If it stood alone, perhaps bankruptcy courts would have complete control over disputes between bankrupts and their creditors as to whether or not the property claimed as exempt is in fact exempt against any particular creditor who may have a lien claim against it, or hold waiver of exemption as to this debt. But that this was not the intent of congress, we submit is clear from the balance of the act, cited above, showing plainly, as it seems to us, the purpose to leave all questions of exemption to the State laws to be applied by the State courts. The jurisdiction granted in the second section of the act has its scope. Questions of exemption may be divided into two general classes:

1. Does the exemption claimed fall within the general law of the State wherein the petition is filed, so that it is valid against all the world; absent any lien fixed thereon by operation of law or act of the party, or any valid waiver of his right to claim as against any particular debt; in other words is it *generally* exempt?

2. The exemption claimed being within the provisions of the State laws so that, absent the factors above enumerated, it would be generally exempt; then is it good against A, claiming a lien thereon by reason, say, of a mortgage covering it; or against B, who holds a waiver-of-exemption note?

These classes are wholly distinct. The first class, by its very nature, must be tried in the *forum* where the bankrupt makes his claim and the question arises. It is a preliminary question in which the bankrupt on one side and the trustee on behalf of all creditors on the other are interested (*McGahan vs. Anderson*, 113 Fed. Rep., at 118.) It is a question, pending the determination of which, it is not certain to just what property the trustee has title. To illustrate: the laws of Alabama allow personalty to the value of $1000.00 as exempt; a bankrupt claims $2000.00 in personalty. To this he is not entitled and the bankruptcy court only could hear and determine the claim. Again the bankrupt claims as exempt personalty worth $1500.00 but lists it at $1000.00; a creditor contests his claim. The issue made would be tried properly before the bankrupt court. So, if a single man without family should move from Alabama (where the only requisite to the right to claim exemption is citizenship) to Georgia (where it is necessary that he be the head of a family), and in Georgia files his petition in bankruptcy claiming his exemption, this would be for the bankruptcy court. The jurisdiction over this class is illustrated by the decisions in

Re Turnbull, 106 Fed. Rep. 667, (issue whether articles claimed as exempt be within Mass. statute.)

Re Mayer, 108 Fed. 599, (question of determination of boundaries of claim of homestead exemption; and issue as to whether or not claimant had abandoned homestead.)

McGahan vs. Anderson, 113 Fed. Rep. 115, (issue as to whether or not bankrupt had so acquired property claimed as to entitle him to claim as exempt under statute.)

And see Brand. on Bankr., (2nd Ed.,) p. 126, Sec. 2, and cases there cited.

On the other hand it has been expressly held that property *generally* exempt cannot be subjected *in the bankruptcy court* to

the satisfaction of the debt of a creditor who holds a waiver of exemption as to this particular debt, or has a claim of lien on the exempt property.

Re Grimes, 96 Fed. Rep. at 534.
Woodruff vs. Cheeves, 105 Fed. Rep. 601, at 606.
Re Hill, 96 Fed. Rep. 185.
Lockwood vs. Exchange Bank, 190 U. S., 294.
Re Hatch, 102 Fed. Rep. 280.
Re Jackson, 116 Fed. Rep. 46.
Ingram vs. Wilson, 125 Fed. Rep. 913.

In *Grimes'* case, as in this case, the trustee had set apart Grimes' money as exempt but had not turned it over to him. Grimes promised to pay his landlord back rent out of his exempt property, but failed to do so. The landlord, like appellee in the case at bar, applied to the bankruptcy court to order the trustee to pay to him his rent. The court declined on the ground that we are now urging.

In *Woodruff vs. Cheeves* the circuit court of appeals for the fifth circuit denied the right of the bankruptcy court to administer the exempt property of a bankrupt for the benefit of certain creditors holding waiver-of-exemption notes.

So also *Hill's* case, *supra*, wherein is well put the argument based on the express reservation, by the act of bankruptcy, of title in the bankrupt to his exempt property. (See opin., p. 186.)

In *Hatch's* and *Jackson's* cases, *supra*, the court applied this same doctrine to liens; the lien in *Hatch's* case, as in the case at bar, being that of a mortgagee who sought to enforce it in bankruptcy.

See also Brand. on Bankr., (2nd Ed.,) Sec. 2, p. 126; Sec. 4, p. 128; Collier on Bankr., (4th Ed., p. 78).

Lastly, to cap the whole, we have this court's well considered decision in *Lockwood vs. Bank*, *supra*, which seems to us to rule this case.

So, while the courts have not in terms stated the distinction between the two classes of cases of exemption, and in terms applied the jurisdiction to the first class and withheld it from the second; yet such is the practical effect of the decisions above cited, every one of which that assert jurisdiction, involved

a determination solely of whether or not the property was *generally* exempt. See language of court in *Ingram vs Wilson*, *supra*.

There are some decisions that may seem to tend to the contrary of what we urge, but we submit that they are opposed to principle; and they were rendered before the *Lockwood* decision was announced.

So we submit that if a claim of exemption made by a bankrupt is one that *would be valid generally under the State law*, and he has complied with the provisions of the Act of Brnkruptcy as to claiming his exemption, the court is done with it and can not proceed to enforce a lien, be it ever so valid, against the property so claimed.

Such we submit is the case at bar. The constitutional and statutory provisions of Alabama relating to exemptions, so far as they touch this case, are as follows:

"Every homestead, not exceeding eighty acres, and the dwelling and appurtenances thereon, to be selected by the owner thereof and not in any city, town, or village. or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the appurtenances thereon, owned and occupied by a resident of this State, and not exceeding the value of two thousand dollars, shall be exempt from sale on execution or any other process from a court for any debt contracted since the thirteenth day of July, eighteen hundred and sixty-eight, or after the ratification of this constitution. Such exemption, however, shall not extend to any mortgage lawfully obtained, but such mortgage or other alienation of said homestead by the owner thereof if a married man, shall not be valid without the voluntary signature and assent of the wife to the same." Constitution of 1901, Article X, Section 205.

"HOMESTEAD EXEMPTION.—The homestead of every resident of this State, with the improvements and appurtenances, not exceeding in value two thousand dollars, and in area one hundred and sixty acres, shall be to the extent of any interest he may have therein, whether a fee or less estate, or whether held in common or in severalty, exempt from levy and sale under execution or other process for the collection of debts contracted after the twenty-third day of April, 1873, during his life and occupancy." Sec. 2033, Code of Alabama of 1896.

The other provisions, both constitutional and statutory, relate to exemptions to widow and minor children, the effect of mechanic's liens, the manner of alienation of homestead, per-

sonalty exemptions, and the machinery for claiming and contesting claims in the State courts.

The above cited extracts and the matters mentioned in the foregoing paragraph constitute all the law of exemption in Alabama. We do not set out the law as to personalty for this fight is over the realty exemption only, no question being raised as to the personalty.

It is set out in the judge's certificate (Rec., p. 1) that Lucius was on November 23rd, 1901, a resident citizen of Alabama and has ever since been so. So he was entitled to claim his exemptions. In June, 1902, Lucius' dwelling house was destroyed by fire. (Rec., p. 1.) This was the condition of Lucius' homestead when on October 4th, 1902, he filed his petition in bankruptcy, accompanying it with his claim of exemption. (Rec., p. 2) Instead of claiming the lot, perhaps of little value, Lucius claimed the insurance money to the extent of $1,000.00. (Rec., p. 2.) This he had a right to do under the Alabama decisions. (See *Ellis vs. Pratt City*, 111 A., 629; and see Opin., pp. 631-2.

On April 2, 1903, the trustee reported that he had set apart as exempt the insurance money claimed.

Doesn't that fulfil every requirement of the Alabama law and the bankruptcy act? Lucius, a resident citizen of Alabama, claims, in accordance with the provisions of the bankruptcy act, the proceeds, as allowed by the law of Alabama, (and, indeed, we take it, the general law of exemption common to all the States), of the insurance money on what is admitted without cavil to be his homestead, and the trustee sets it aside as exempt.

Why doesn't that come within the first class of exemptions hereinabove specified? There is no contest of the amount, of the character of the homestead, of its limits, of Lucius' citizenship, of his right to avail himself of Alabama law, of his right to claim the insurance. All these things are admitted. Then how can the bankruptcy court try any question of exemption in this case? What is there to try? Only the questions of the lien of appellee's mortgage on Lucius' property claimed as exempt. But we believe that the cases heretofore cited establish that this question cannot be tried in the bankruptcy court. So, we say, that court was without jurisdiction to determine

that appellees had a lien, and having so determined was without jurisdiction to enforce it by ordering the trustee to pay over to appellee the property claimed as exempt. He should have been remitted to the State forum.

The decision of the able district judge proceeds from what we conceive to be two misconceptions; one, a failure to distinguish between the two classes of exemptions that we endeavor to point out; the other an application to the realty exemption (which was claimed in money) of the law relating to personalty exemption.

The first is shown by the opening sentence of the opinion. (Rec., p. 4.) This sentence, we respectfully submit, begs the question. There is no contention that the bankruptcy court cannot determine the bankrupt's claim of exemption; the whole question is one of determining *what that determination involves.* If it involves the determination and assertion of the lien in the case at bar, why not the assertion of a waiver of exemption claim, or any other claim or lien? Where can the line be drawn? What becomes of the plain intention of Congress to leave exemption matters outside the bankruptcy court?

Again, we take issue with the learned judge in his statement that the question is, "whether (the court) has jurisdiction to determine the claim of the bankrupt to certain money in the hands of the trustee *collected by him as assets of the bankrupt estate.*" This very money was claimed by the bankrupt as exempt when he filed his petition. By the terms of the act itself (Sec. 70, subd. a, cited heretofore) title to this property never passed to the trustee never became "assets of the bankrupt estate." The trustee has only a qualified title for the purpose of setting the property aside to the bankrupt.

Re Hill, supra and other cases above cited.

Brand, Bankrupt, (2nd Ed.) Sec. 6, pp. 130, 131.

So, we submit the opinion starts with a false premise.

The cases cited by the learned judge (Rec., p. 5, 124 Fed. Rep., 456) to sustain his position that the court has jurisdiction

in the case at bar (in addition to those on which we rely) to-wit:

Cannon vs. Dexter Broom Co., 120 Fed. Rep., 657;
Re Butler, 120 Fed. Rep., 100;
Re Boyd, 120 Fed. Rep., 999;
Re Campbell, 124 Fed. Rep., 417,

are all on the border line. They involve cases in which the State statutes provided that goods shall not be exempt against claims for the unpaid purchase price. They are flatly opposed by *re Wells*, 105 Fed. Rep., 762, (citing *re Bass*, much relied on in *Lockwood's* case), which seems to us to present the better view, the view more in consonance with what we deem the reason of the matter as hereinabove argued. And see *Ingram's* case, *supra*.

These cases, also, if they can be construed to support the jurisdiction asserted in the case at bar, would seem opposed to all the cases heretofore cited and in opposition to the weight of authority in the lower courts as well as *Lockwood's* case in this court.

But, says the learned judge in effect in answer to the contention based on Sec. 70 of the Act, this does not apply till the referee has confirmed the trustee's setting apart.

Sec. 47-a. (11) of the Act, makes it the duty of the trustee to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

By General Orders in Bankruptcy, XVII—" . . . . any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him. . . . "

This, so far as we know, is the only provision made for setting in motion the "machinery" for trying the right of bankrupts to property claimed as exempt, and set apart to them by the trustee.

And even if this question were one of *general* exemption that the court could try, yet we respectfully urge that, the court being strictly confined by the Federal law of bankruptcy, *the only method by which Lucius' right to this insurance as exempt could be tried is the method prescribed by that Federal law:* that is, *in the manner set out in the said general order No. XVII*—the rule

promulgated by the Supreme Court in pursuance to the express requirement of the Act. (Sec. 30.)

In the case at bar, the trustee set apart the bankrupt's exemptions and reported the items and estimated value thereof to the court.

No exceptions to the trustee's report were ever filed.

Suppose that the referee should wrongfully refuse to confirm the trustee's action and should proceed to enforce against the property in the trustee's hands, claimed as exempt, the claim of a creditor with waiver of exemption paper, would this confer on him jurisdiction to do what beyond controversy he cannot do? Yet that is the case at bar. The referee fails to confirm the trustee's report, proceeds to hear and determine a creditor's claim of lien on the bankrupt's property that he claims as exempt, decides that the lien exists, and orders the trustee to pay to the creditor the very property claimed as exempt; and the court on appeal and review of the referee's action says that the property never became impressed with the character of exempt property because the referee never confirmed the trustee's action! Verily, if this be law the bankruptcy court's jurisdiction is limited by the referee's discretion. We submit that this court will not subscribe to such doctrine.

The learned judge seeks to avoid the effect of the *Lockwood* decision on the idea that there the property was exempt as specific property and that the bankrupt had done all that the statute prescribed he should do; whereas here "the State law has not prescribed the specific money *or any specific personal property* (our italics) to be exempt and this specific money has not been set apart to the bankrupt as exempt and has not been defined as that upon which the law operates as exempt."

But is this correct? Wherein does the case at bar differ from the *Lockwood* case? Bear in mind that we are not dealing with *personal property* but with realty; that the state law does prescribe the realty to be exempt, to-wit, the homestead (see extracts from constitution and laws heretofore cited); that it is admitted that the property mortgaged and afterward burned was Lucius' homestead, (see Rec., pp. 1 and 2); that the money claimed arose out of and took the place of the homestead; that

the bankrupt did all that was incumbent on him and all that he could do in claiming property and promptly under the bankruptcy Act; and that the trustee set apart this identical fund, (Rec , pp. 2-3,) specifying the insurance policy numbers. Is not this on all fours with the facts in *Lockwood's* case? Is there any substantial difference?

And to close the argument by saying; "and besides the creditor has a lien," is, we submit, again begging the question. Admit he has a lien, the question under discussion is, could the court enforce that lien?

That the bankruptcy court could enforce a lien against property that forms assets in bankruptcy is not denied. The insistency is that the property claimed as exempt was not "assets in bankruptcy." It seems to us therefore that *Hutchinson vs. Otis, 23 Sup. Ct. Rep., 778,* is by the way and not applicable to the case at bar.

We submit, then, that the court erred in assuming jurisdiction to hear and determine appellee's petition, and that it erred in granting it the relief prayed; wherefore, we submit, the judgment of the district court should be reversed and the cause remanded to the district court with instructions to dismiss appellee's petition and order the trustee to pay to appellant the money heretofore set aside as exempt to him.

Respectfully submitted,

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